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AUTHOR	Hemnes, Thomas M. S.; Pyle, Alexander H.; McTeague, Laurie M.; Dyal-Chand, Rashmi
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ABSTRACT

The pamphlet discusses how colleges and universities can protect themselves and their employees from liability for copyright infringement, and proposes some guidelines to keep most uses of copyrighted material within the law. The principles underlying the Copyright Act of 1976 are explained, including the four-factor test to determine whether a use of a work constitutes fair use: (1) purpose and character of use; (2) nature of the copyrighted work; (3) amount and substantiality of copying; and (4) effect of the use of the work. Interdependence of the four factors is emphasized. The 1976 "Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals" is explained, and applications of copyright law to particular circumstances (libraries, performances, music, audiovisual works, multimedia works, creation of ad hoc anthologies, use of factual information, and computers on campus) are discussed. How to obtain copyright permission for published works and penalties for infringement are also explained. Guidelines for classroom copying, educational uses of music, off-air recording of broadcasts for educational purposes, and fair use guidelines for multimedia are appended. (Contains 72 references.) (MSE)

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THE PUBLICATION SERIES

A Guide to Copyright Issues in Higher Education

FOURTH EDITION

THOMAS M.S. HEMNES
ALEXANDER H. PYLE
LAURIE M. MCTEAGUE
RASHMI DYAL-CHAND

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Thomas M.S. Hemnes is a partner in the Boston law firm, Foley, Hoag & Eliot, and an adjunct professor in Intellectual Property Law at Northeastern University School of Law. His practice concentrates in the areas of intellectual property and domestic and international commercial transactions. A graduate of Harvard College and Harvard Law School, Mr. Hemnes has testified in Congress, published, and lectured extensively on intellectual property subjects. Mr. Hemnes' professional affiliations include the American Bar Association Business Law Section, the International Trademark Association, and the Copyright Society of the USA.

Alexander H. Pyle is an associate in the Boston law firm, Foley, Hoag & Eliot. He is a graduate of Wesleyan University, the Peter Stark Motion Picture Producing Program at the University of Southern California, and Harvard Law School. He practices corporate law, including intellectual property and licensing matters.

Laurie M. McTeague is an associate in the Boston law firm, Foley, Hoag & Eliot. She is a graduate of Bucknell University and Harvard Law School. She practices corporate and intellectual property law.

Rashmi Dyal-Chand is an associate in the Boston law firm, Foley, Hoag & Eliot. She is a graduate of Grinnell College and Northeastern University School of Law. She practices corporate and intellectual property law.

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A Guide to Copyright Issues in Higher Education

The Copyright Act of 1976 grants to copyright owners the exclusive right to reproduce their works, prepare derivative works based upon them, distribute copies of them, perform them, and display them. In addition, owners of copyrights in visual works have "moral rights," including the right to prevent intentional distortion, mutilation, or modifications of their works. Works that receive copyright protection include unpublished and published works,[1] as well as works that are protected by the Berne Convention, the Agreement on Trade-Related Aspects of Intellectual Property, and a number of other international treaties and conventions. Anyone who undertakes one of the statutorily-prohibited acts without permission of the copyright holder has infringed the copyright, unless the act falls within one of the exceptions set forth in the statute. This means that many seemingly routine campus activities, such as duplicating, performing plays and other works, posting and distributing information on computer networks, and copying digital information may violate federal or international law.

The purpose of this pamphlet is to discuss how colleges and universities can protect themselves and their employees from liability for copyright infringement. Because copyright is a rapidly evolving area of the law, definitive answers are not always possible. This pamphlet, however, proposes some guidelines that will keep most uses of copyrighted material within the law.

It should be noted at the outset that certain works are not protected by copyright. Works of the federal government, for instance, are generally not copyrightable unless they are commissioned works unrelated to the official duties of government. In addition, works published more than seventy-five years ago, and not subsequently updated, are no longer protected by the Copyright Act; such works are in the public domain.

Facts and ideas are also not copyrightable,[2] but the manner in which an author expresses a fact or idea is. No one owns the life story of George Washington, for example, but nevertheless a biography of Washington is copyrightable. Distinguishing protected expression from unprotected ideas can sometimes be difficult since even paraphrasing can constitute infringement if the paraphrase is "substantially similar" to the original. On the other hand, use of names, places and events is generally safe, as is summarizing a scholar's theory.

For a work to be copyrightable, it must contain some element of originality or creativity. This requirement does not demand novelty, ingenuity, or

1. Copyrightable "works" include literary, musical, dramatic, pictorial, graphic, sculptural, and architectural works, as well as pantomimes, choreography, motion pictures, and sound recordings. 17 U.S.C. §102. Computer software is protectable as a "literary work."

2. Nor are procedures, processes, systems, methods of operations, or discoveries. For example, in *Lotus Development Corp. v. Borland International, Inc.*, 49 F.3d 807, 815-16 (1st Cir. 1995), *aff'd*, 116 S.Ct. 39 (1996), the court held that the menu command hierarchy for a computer spreadsheet program was an uncopyrightable method of operation. Other courts have suggested that similar command structures could be copyrightable. *See e.g., Autoskill v. National Educational Support Systems*, 994 F.2d 1476, 1495 n.23 (10th Cir.), *cert. denied*, 510 U.S. 916 (1993); *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1477 (9th Cir.), *cert. denied*, *BB Asset Management, Inc. v. Symantec Corp.*, 506 U.S. 869 (1992).

aesthetic merit. The author must have contributed something recognizably his own and not merely a trivial variation of someone else's work.

A copyright is infringed when an exclusive right of the copyright holder is violated. However, in an attempt to balance incentives for authors with the public need for information, the law excuses certain infringements of copyrights under the doctrine of "fair use." In fact, the legality of much campus copying turns on the notion of fair use. The issue of what constitutes fair use has been called the most troublesome in the whole law of copyright.

The Copyright Act specifies a four-factor test to determine whether a use of a work constitutes fair use. The four factors are (1) the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

In 1976, because of the difficulty of applying the statutory test, private groups representing educational institutions, authors and publishers developed the *Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals* (the "*Agreement on Guidelines*"). These guidelines are admittedly restrictive and only represent the "minimum standards of educational fair use."[3] Two major educational organizations – the American Association of University Professors (AAUP) and the Association of American Law Schools (AALS) – refused to sign, endorse, or be bound by the *Agreement on Guidelines*. The AALS believed that the guidelines were too restrictive and that courts, not interest groups, should decide what constitutes fair use.

Also in 1976, representatives of music publishers and music teachers developed the *Guidelines for the Educational Uses of Music*. Three years later in 1979, representatives of educational institutions, copyright proprietors and creative guilds and unions developed the *Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes* (the "*Off-Air Guidelines*"). Finally, in 1997, representatives of these same groups developed the *Fair Use Guidelines for Educational Multimedia* (the "*Multimedia Guidelines*").

The four guidelines are reproduced in the Appendices. Anyone staying within these guidelines should be within the bounds of fair use, although there is less certainty with respect to the *Multimedia Guidelines* given their recency and lack of familiarity to courts.

COPYING UNDER THE COPYRIGHT ACT

What constitutes copying or reproduction under the Copyright Act is a much more ambiguous issue now than when the Copyright Act was first written. Similarly, what constitutes a derivative work is more difficult to ascertain. The right to copy and to create derivative works are both exclusive rights of the owner.

3. *Agreement on Guidelines*, introductory paragraph.

Copying consists of many more acts than the taping of a complete sound recording, or the photocopying or transposing of complete works or images onto a different medium. For example, it is now possible to "sample" music digitally by converting analog sound waves from the original work into a digital code that can be changed or combined with other sounds by computer, resulting in transformation and a completely different use of the original sounds. Similarly, it is possible to use an optical scanner to copy a photograph or other visual image into a computer and then, in stages, to make changes to the image until it is practically impossible to discern that the changed image was "derived" from the original. In both cases, the second work may sound or look completely different than the original, yet the second work derives from the original.

The traditional test for copyright infringement is to ask whether the accessed work is "substantially similar" to the original. This test arguably fails to capture modern methods of copying such as digital sampling. Therefore, in an effort to protect copyright owners, an expanded test for copying has begun to emerge. For example, some courts have held that digital sampling of music is unlawful infringement even where a small portion of the original piece is copied or where the second piece is of a completely different genre than the original, if the portion taken was "original" or "significant" or if the copying substantially diminishes the value of the original work.[4] The question of what constitutes unlawful misappropriation of visual images by computerized means remains open. However, the standard for visual images is probably more stringent in light of the "moral rights" of owners of visual works not to have their works distorted or modified. For computer programs and other computer products, courts more commonly examine products at varying levels of abstraction to determine what parts of the products are protectable expression as contrasted with unprotectable ideas, processes, or elements dictated by external factors.[5]

All of these developments imply that colleges' and universities' concerns are not limited to the traditionally problematic activities such as the performance of a song or drama or photocopying of a work. Colleges and universities will also need to consider the potential infringement arising from the wide array of copying and distribution made possible by the manipulation of digital information, particularly in network environments.

FAIR USE UNDER THE COPYRIGHT ACT

While the *Agreement on Guidelines*, the *Off-Air Guidelines*, the *Guidelines for Educational Uses of Music*, and the *Multimedia Guidelines* offer clear rules for non-violative copying under the Copyright Act, they express only the minimum standards of educational fair use. If a college or university wishes to copy more than these guidelines allow, without first obtaining

4. *Jarvis v. A&M Records*, 827 F. Supp. 282 (D. N.J. 1993). *See also Tin Pan Apple, Inc. v. Miller Brewing Co., Inc.*, [1992-1994 Transfer Binder] Copyright L. Rep. (CCH) ¶ 27,238 (S.D. N.Y. Feb. 23, 1994); *Grand Upright Music Ltd. v. Warner Brothers Records, Inc.*, 780 F. Supp. 182 (S.D. N.Y. 1991).

5. *Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992); *Baystate Technologies, Inc. v. Bentley Systems, Inc.*, 946 F. Supp. 1079 (D. Mass. 1996); *Control Data Systems, Inc. v. Infoware, Inc.*, 903 F. Supp. 1316 (D. Minn. 1995).

permission from the copyright owner, it must look to the four-factor fair use test set forth in the Copyright Act. The test is flexible but difficult to apply with certainty.

The First Factor: Purpose and Character of Use

The first factor examines the purpose and character of the use. Nonprofit educational uses are preferred.[6] As a result, the first factor generally favors a finding of fair use by educational institutions, professors, and students. Nonprofit educational purposes, however, have not always mandated a finding of fair use. In *Encyclopedia Britannica Educational Corp. v. Crooks*,[7] for example, a court determined that a nonprofit educational institution could not make videotapes of copyrighted films and distribute them to public schools in a "highly organized and systematic program for reproducing videotapes on a massive scale."[8] Similarly, in *Wihtol v. Crow*,[9] a teacher and choir master who made 48 copies of plaintiff's song for use by students and choir members was held to have gone beyond fair use.

For-profit (or commercial) uses are generally disfavored, even when they serve educational purposes.[10] However, for-profit uses that are transformative[11] or research-oriented sometimes satisfy the first factor if they serve a broader public interest.[12]

The Second Factor: Nature of the Copyrighted Work

The second factor focuses on the nature of the copyrighted work – that is, whether the work is published or unpublished, fact or fiction. In general, it is much more difficult to establish fair use of an unpublished work than a published work, because the copyright owner of an unpublished work is thought to be particularly concerned with how the work is first presented to the public, and may in fact not want the work published at all.[13] Since one policy of copyright law is to encourage the dissemination of information, copying a factual work is more likely to be fair use than copying a work of fiction.

The Third Factor: Amount and Substantiality of Copying

The third factor takes into consideration the amount and substantiality of copying. The statute does not set a numerical or percentage limit and the

6. In addition, uses that are linked to free speech rights or important public issues are generally favored. In *National Rifle Ass'n v. Handgun Control Federation*, 15 F.3d 559 (6th Cir.), *cert. denied*, 513 U.S. 815 (1994), for example, the court held that the defendant's copying of a list of legislators constituted fair use.

7. 447 F. Supp. 243 (W.D. N.Y. 1978).

8. *Id.* at 252.

9. 309 F.2d 777 (8th Cir. 1962).

10. *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1388-89 (6th Cir. 1996), *cert. denied*, 117 S.Ct. 1336 (1997) (first factor weighed against for-profit copy shop, even though it made copies for university students).

11. *Campbell v. Acuff-Rose Music, Inc.*, 114 S.Ct. 1164, 1177-1178 (1994) (song which parodied original song by using portions of original lyrics and melody was transformative of original).

12. *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 921-22 (2nd Cir. 1994), *cert. denied*, 116 S.Ct. 592 (1995).

13. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 554-55 (1985).

extent of permissible copying is impossible to predict with certainty. The Supreme Court has in one instance held the copying of 300 words from an unpublished book to be an infringement and in another instance held the copying of an entire work to be fair use.[14] Even a small portion of a work may be deemed substantial if the portion constitutes a central or critical part of the original work. In *Princeton University Press v. Michigan Document Services, Inc.*, a court held that "the fact that the professors thought the excerpts sufficiently important to make them required reading strikes us as fairly convincing evidence of the qualitative value of the copied material."[15] Note that substantiality is measured relative to the original work, not the infringing work. Taking a substantial portion of the copyrighted work infringes even if the part taken is an insubstantial portion of the accused work.

The Fourth Factor: Effect of the Use of the Work

The fourth factor concerns the effect of the use on the market for or the value of the work.[16] The Supreme Court has stated that fair use is limited to copying by others that does not impair materially the marketability of the original[17] or the market for derivative works.[18] For example, this factor takes into account whether the copying has resulted in the purchase of the copy as a substitute for the original or whether licensing revenues have been lost. Where the copying is a nontransformative duplication of the original, there is often an inference of market harm.[19] However, the Court has cleared a broader field of fair use for parodies, criticisms, and other "transformative" uses, even when they impair the market for the original work.[20]

The Interdependence of the Four Factors

The four factors in the fair use test are interdependent. For example, the fourth factor is related to the third factor, in that the more substantial the copying, the more likely it is that copying will have an adverse economic effect on the copyright owner. Also, when the copying serves the purpose of advancing scientific research (the first factor), courts may allow broader discretion to the researcher on the amount of permissible copying (the third factor).

In *Williams & Wilkins Co. v. United States*,[21] for instance, a court ruled that although a library made 93,000 copies of articles in one year, its copy-

14. Compare *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) with *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417 (1984).

15. 99 F.3d 1381, 1389 (6th Cir. 1996) (citations omitted).

16. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985) (characterizing this factor as the most important in the fair use analysis). *See also Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1385 (6th Cir. 1996) (analyzing fourth factor first because of its primary importance).

17. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556-67 (1985) (quoting 1 M. Nimmer, *Nimmer on Copyright*, §1.10[D], at 1-87).

18. *Campbell v. Acuff-Rose Music, Inc.*, 114 S.Ct. 1164, 1177 (1994).

19. *Id.* at 1177-78.

20. *Id. See also Belmore v. City Pages, Inc.*, 880 F. SUPP. 673 (D. Minn. 1995).

21. 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court* (per curiam), 420 U.S. 376 (1975).

ing did not exceed fair use.[22] The case involved a commercial publisher of technical and scientific journals that sued the United States for copying done by the National Institute of Health and the National Library of Medicine. The N.I.H. had two subscriptions to each of 3,000 journals and copied articles upon request without inquiring into the reason for the photocopies. The court of claims held that "[t]he result of a flat proscription on library photocopying would be ... that medical and scientific personnel would simply do without ... many of the articles they now desire, need, and use in their work."[23]

On the other hand, in *American Geophysical Union v. Texaco Inc.*,[24] a court held that systematic photocopying of research articles by numerous individual scientists at Texaco was *not* fair use. While recognizing that the copying was of largely factual materials used for scientific research, the court held that such copying was not fair use because (1) it was done for the purpose of increasing the number of copies available without buying the journals, (2) it was substantial, and (3) it resulted in the loss of substantial licensing revenues.[25] The Court pointed out that practical licensing arrangements (such as those provided by the Copyright Clearance Center, discussed below) had become readily available since the *Williams* decision.[26] Consequently, the court found that scientific research would *not* be significantly hindered, because Texaco could ensure that its scientists obtained the articles needed for their work.[27]

Although the fourth factor has been considered by some courts to be the most important, other courts have emphasized different factors, depending upon the facts of the case. One commentator has noted that the four factors overlap so that no one factor is critical to a court's ruling. "[T]he fact that defendant's purpose was to supplant plaintiff's market has properly been held to bear on both the first and fourth factors. Similarly, the fact that defendant's use had a commercial motive, or took a substantial portion of plaintiff's work, will also usually imply an injury to plaintiff's market."[28]

THE ROLE OF THE GUIDELINES

An influential commentator predicted that the *Agreement on Guidelines* would be treated as part of the copyright statute itself.[29] Because of the uncertainty inherent in the four-factor test, this prediction has, in some cases, proved accurate. At least two federal appellate courts, for example, have referred to the *Agreement on Guidelines* in making a fair use determi-

22. The court, however, emphasized that this library was a nonprofit institution devoted to advancing scientific research "untainted" by commercial gain. The court was also impressed that the library carefully made sure that copies were generally not more than 50 pages long, and that researchers did not receive more than one copy of an article.

23. *Id.* at 1357.

24. 60 F.3d 913 (2nd Cir.1994).

25. *Id.* at 918-931.

26. *Id.* at 929-931.

27. *Id.* at 932.

28. 1 Goldstein, *Copyright*, § 10.2.2, at 213-214.

29. See 3 Nimmer, *Nimmer on Copyright* § 13.05(E) (3) (a), at 13-96 (1984).

nation,[30] and another has characterized them as persuasive.[31] In addition, the United States Copyright Office has published a circular for educators that quotes the *Agreement on Guidelines* as authority. In that circular, the objection to the *Guidelines* by the two academic associations is only mentioned in a single sentence, without explanation. Many legal commentators also seem to assume that the *Agreement on Guidelines* is the law.

Not surprisingly, therefore, several important out-of-court settlements have required defendants to copy only within the *Agreement on Guidelines*, absent permission from the publisher. The first two settlement agreements related to suits against copying services only. However, one was the result of a suit against professors and New York University, as well as a photocopy service.[32] Combined with the *Princeton University Press* case, such agreements may serve to "create a precedent for a narrow view of fair use and alert ... other copy centers and universities that photocopying more materials than the *Guidelines* allow may invite future actions."[33]

Because of the de facto status of the *Guidelines*, the safest course is for universities to abide by them. Certainly, the *Agreement on Guidelines* is not the law, and the statute itself probably allows more copying than the *Guidelines* suggest. But, going beyond the *Guidelines* – in ways described in the preceding section of this pamphlet – heads into less clearly-defined areas of the law. Except in the context of their libraries, which often fall within the special statutory protection described below, institutions could be vicariously liable for infringements committed by their employees in the course of their duties. For this reason, educational institutions may find it prudent to establish procedures to inform their employees of the requirements of the *Guidelines* as a safe harbor against liability.

APPLICATION OF COPYRIGHT LAW TO PARTICULAR ACADEMIC CIRCUMSTANCES

Libraries

There are three sources of protection for libraries and archives under the Copyright Act. First, the traditional fair use test applies to library copying. In addition, Section 108 of the Copyright Act provides protections unique to libraries and archives for copying copyrighted material. Finally, Section 109 of the Copyright Act, which codifies the "first sale doctrine," protects libraries and many other institutions that sell or rent copyrighted material.

Libraries may be vulnerable to vicarious liability for their patrons' photocopying of printed materials and downloading and printing of copyrighted

30. *Marcus v. Rowley*, 695 F.2d 1171, 1178 (9th Cir. 1983); *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1390 (6th Cir. 1996).

31. *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 919 n.5 (2nd Cir. 1994).

32. *Addison-Wesley v. New York University*, 1983-1984 Copyright L. Dec. (CCH) ¶ 25,544 (1983). The settlement in that case does, however, allow the four-factor test to be used if a faculty member has sought and been denied permission to copy.

33. Note, "Fair Use of the Guidelines for Classroom Copying? An Examination of the Addison-Wesley Settlement," 11 *Rutgers Computer & Technology Law Journal* 111 (1985).

materials from CD-ROMs and on-line databases. When a patron takes an article or a book to a photocopier, prints out text from an on-line database accessed via computer, or downloads such material onto a disk or hard drive, the patron makes a copy of that material.[34] Therefore, photocopying of printed materials and downloading and printing of electronically-stored materials should be analyzed under the fair-use standard described above.

To ensure compliance with the Copyright Act at least with respect to photocopies, libraries can follow the stringent requirements of Section 108 of the Copyright Act described below. In addition, short of limiting their patrons' ability to download and print altogether, university libraries can consider programs to monitor the number of electronic copies made and to pay for any such copies. Some universities, for example, have participated in an experimental Billing and Royalty Tracking program (BART), in which each page of material entered onto a CD-ROM is encoded, so that each print-out can be recorded and debited from a debit card with which the user initiates the system.[35]

Section 108 of the Copyright Act provides special protection to libraries and archives that follow certain procedures to avoid liability when copying sections of books and articles or to avoid vicarious liability when their employees or students violate the copyright statute. Notably, Section 108 provisions are *in addition to and not in lieu of* any fair use determination; therefore, copying by libraries that does not fall under Section 108 may still be permissible under fair use.

Libraries will be protected by Section 108 if they fulfill the criteria specified by Section 108(a), namely, that

> (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
>
> (2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
>
> (3) the reproduction or distribution of the work includes a notice of copyright.

Even libraries in profit-making medical clinics and other for-profit institutions may qualify if they make their collections "open" or "available."

Once a library qualifies as a Section 108(a) library, it must also satisfy the other criteria of Section 108. A qualifying library may make individual copies in the instances described below, provided that neither the library nor its employees know or have reason to know that the copying is systematic, or that the copying is being used to substitute for a subscription to or purchase of the work.

34. Indeed, some commentators have argued that a patron using these new technologies makes a copy, or publicly displays the electronic copy, simply by *accessing* such text. Ginsburg, "Reproduction of Protected Works for University Research or Teaching," 39 *Journal of the Copyright Society*, 181, 212 (1992); Jensen, "Is the Library Without Walls on a Collision Course with the 1976 Copyright Act?" 85 *Law Library Journal*, 619, 621 (1993).

35. Ginsburg, "Reproduction of Protected Works for University Research or Teaching," 39 *Journal of the Copyright Society*, 181, 213 (1992).

What a Library May Copy for Itself. A library that qualifies under Section 108(a) may copy unpublished works of any sort, including photographs, motion pictures and sound recordings, solely for the purpose of preservation and security or for deposit for research use in another library or archive that makes its collection open or available. Such copies may only be in facsimile form. They may not be translated into "machine-readable" language for storage in a computer database.

A qualifying library may also copy in facsimile form any sort of out-of-print published work in order to replace a damaged, lost, deteriorating or stolen copy if the library has reasonably, but unsuccessfully, attempted to replace the work at a fair price from "the trade," including reprint houses and out-of-print sources.

What a Library May Copy for Its Patrons. A library that qualifies under Section 108(a) may reproduce one article or other contribution to a copyrighted collection or periodical issue, or a small part of any other copyrighted work, for a patron under certain conditions. A qualifying library may also copy all or a substantial portion of a copyrighted work for a patron under the same conditions if the library determines that it cannot obtain a copy at a fair price. The conditions which must be satisfied are as follows: (1) the exemptions do not apply to musical, pictorial, graphic, sculptural or audio-visual works, including motion pictures, but they do apply to news programs; (2) the library making the copy must not have any notice that the patron will use the copy for any purpose other than private study, scholarship or research; (3) the copy must become the property of the user; (4) the library must place a warning of copyright where the orders are placed.

Photocopying By Patrons. The steps that libraries must follow to avoid vicarious liability when their patrons personally copy articles and books at library-owned copying machines are not cumbersome. Section 108(f)(1) of the Copyright Act requires posting of a notice at the machines, which must read as follows:

NOTICE
WARNING CONCERNING COPYRIGHT RESTRICTIONS

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

To minimize liability for copying of computerized material, libraries should also consider posting a Section 108(f)(1) notice in any location where CD-ROMs or on-line services are used.

With respect to a library's lending of copyrighted materials, under the first sale doctrine of Section 109 of the Copyright Act, the owner of a particular copy of a copyrighted work has the right to determine the distribution of that copy. Thus, a college or university or its library may lend or resell a book, periodical, record, audio tape, videotape, or computer program in its collection because the library owns it. It is also permissible for the library to institute a lending fee for works other than records, audio tapes, or computer programs (software). The fee for records, audio tapes and computer software may only cover administrative costs of the lending program. In addition, when lending a computer software, the library must affix to the packaging a copyright warning.

Finally, libraries, and anyone else, may copy, lend or transfer works that are in the public domain. In determining whether a particular work is or is not in the public domain, however, libraries should be aware of the recent amendment to the Copyright Act that restores copyright in numerous works in accordance with the North American Free Trade Agreement.[36]

Performances

Public performance of a copyrighted work may also constitute copyright infringement. A performance that takes place in a school, for example, will often be considered a public performance. Section 110 of the Copyright Act, however, permits public performance of copyrighted works under certain circumstances. The statute distinguishes between dramatic and nondramatic works, grouping musical *compositions* – but not musicals – with the latter. Musicals such as *The Sound of Music* fall under the category of dramatic works.

Dramatic Works. The following is the only exception to copyright infringement for public performance of dramatic works: (1) When a performance takes place in the course of a face-to-face teaching activity – i.e., instructional performances and displays that are not transmitted; and (2) it is in a nonprofit educational institution; and (3) it is conducted in a classroom or similar place (such as a library) devoted to instruction; and (4) in the case of an audiovisual work, the copy (e.g., film or videotape) is lawfully made.

To perform, according to Section 101 of the statute, is "to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." If the four criteria of this exception are not met, a performance of a dramatic work would constitute copyright infringement.

36. 17 U.S.C. §104A. This Section also limits the period of time in which restored works may be sold or otherwise "disposed of."

Nondramatic Works. Rules governing the performance of *nondramatic* literary or musical works are less restrictive than those governing dramatic works. In addition to the exemption discussed above, performances of nondramatic works at nonprofit educational institutions may be (i) transmitted to other classrooms and to handicapped persons who are unable to be present in classrooms, if the performance and the transmission are part of the instructional program, or (ii) open to the public if the performance is not broadcast, the performers are not compensated, there is no admission charge, any proceeds go to educational purposes, and the copyright owner does not object in writing at least seven days before the performance.

It must be noted that these limited exemptions do not affect an author's exclusive right to dramatize or adapt his work. For example, "a performer could read a nondramatic literary work aloud under Section 110(2), but the copyright owner's permission would be required for him to act it out in dramatic form."[37] Furthermore, the purpose for which a performance is given may be significant:

> performances in a series of broadcasts on the development of American literature would be exempt as, probably, would performances in the course of a single broadcast devoted to a critical analysis of a work of a single American author. But reading from that author's work to entertain, rather than to educate students about the author's life or writing style, would not be exempt.[38]

In addition to the above exceptions, there are categories of "performances" that are not copyrightable at all. For example, a sports game or event[39], an academic game[40], and a parade[41] are not "works" that warrant copyright protection (although a broadcast of such events is copyrightable).

Music

The use of music at educational institutions raises several issues under copyright law. First of all, when music is performed live, the performance will be governed by the rules discussed in the preceding section. When pre-recorded music is played before a group, there is not only a performance of the musical work but also of the particular recording. Under copyright law, however, the owner of a copyright in a musical *recording*, as distinct from the underlying *composition*, does not have the exclusive right to perform the recording publicly. Therefore, when pre-recorded music is performed, only the performance of the underlying composition need be analyzed under the statutory provisions governing performances to ensure compliance with copyright law.

On the other hand, the owner of a copyright in a musical recording does have the exclusive right to reproduce the recording, and to perform the work

37. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 45, 83 (1976).

38. 1 Goldstein, *Copyright*, § 5.8.1 at 624.

39. *National Basketball Ass'n v. Sports Team Analysts*, 939 F. Supp. 1071, 1093 (S.D. N.Y. 1996), *aff'd in part, vacated in part on other grounds*, 105 F.3d 841 (2d Cir. 1997).

40. *Allen v. Academic Games League of America, Inc.*, 89 F.3d 614, 616-617 (9th Cir. 1996).

41. *Production Contractors, Inc. v. WGN Continental Broadcasting Co.*, 622 F. SUPP. 1500, 1503 (N.D. Ill.1985).

publicly by means of a digital audio transmission. Therefore, when prerecorded music is copied, for example by making a tape of a song on a compact disc or by uploading a copy onto an Internet web site for public transmission, the exclusive rights of both the owner of the copyright in the recording and the owner of the copyright in the composition may be infringed.

As mentioned above, there are negotiated guidelines similar to those for copying books and periodicals that apply to educational uses of music. With copying music, as with copying anything else, a fair use determination may be made, and a university will probably not be liable for infringement if it stays within these minimum standards of fair use.

For performances of musical compositions that fall outside the scope of fair use, licenses may be obtained from performing rights societies such as Broadcast Music, Inc. (BMI) and the American Society of Composers, Authors, and Publishers (ASCAP).

Audiovisual Works

Showing Videotapes. The rules governing the showing of copyrighted videotapes are the same as those governing the performance of any other copyrighted work. In order to show videotapes in classes, the screening must conform to the exceptions of Section 110(1) for a dramatic work. The law, then, limits the use of videos to classroom settings in conjunction with face-to-face instruction, as in the case of any performance.

The rules become more complicated in the library, where screenings do not coincide with "face-to-face teaching activities." The problems derive from the ambiguity of what constitutes a public performance. Although the boundaries of "public performance" have not yet been tested, a screening in a private library carrel would probably not count as a public performance and would be allowed regardless of the purpose for the viewing. Probably, individuals and very small groups may be permitted to view a videotape in a study carrel or viewing room.[42] Certainly a group of any significant size could only view a video in the library if the screening is in conjunction with face-to-face teaching activities. This follows by analogy to the classroom-use rules. Therefore, showing videos before large groups for purely entertainment purposes probably would not qualify as fair use even in a university library.

Copying Television Programs Off the Air for Classroom Use. Like the *Agreement on Guidelines* discussed earlier, the *Off-Air Guidelines* represent only the minimum standards for proper fair use. Unlike the *Agreement on Guidelines*, which have become de facto law, the *Off-Air Guidelines* were

42. However, the Third Circuit in *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984) and *Columbia Pictures Industries, Inc. v. Aveco Inc.*, 800 F.2d 59 (3d Cir. 1986), held that a commercial establishment that rents private viewing rooms to members of the general public for individual screenings of video cassettes is, in fact, giving public performances for a profit. However, hotels that offer pay cable movies have been found to be exempt because hotels rooms are considered private places. *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278 (9th Cir. 1989). The justification seems to be that a hotel room is a temporary domicile, while a private video room is not. Moreover, the primary purpose of the video establishments in *Redd Horne* and *Aveco* was to make money off the viewing of video cassettes.

created before *Sony Corp. of America v. Universal City Studios*[43] was handed down by the Supreme Court. That case involved home recording and, in particular, the vicarious liability of Sony Corporation for infringement perpetrated by customers who purchased the company's video recorders. The language of the decision places a heavy burden on the plaintiff to prove economic damage, and mere time-shifting of television programs was held not to have caused any harm to program owners. While *Sony* dealt with taping at home, its logic would likely extend to taping by educational institutions, as well.

For example, the *Off-Air Guidelines* require that a broadcast taped off the air by a non-profit educational institution must be erased 45 days after the date of recording. There is no legislative or case law basis for this arbitrary number of days. In fact, if a teacher tapes a program for a single later viewing with her students, it should not matter how long she or he delays the screening. As Justice Stevens put it, "the time-shifter no more steals the program by watching it once than does the live viewer."[44] In *Encyclopedia Britannica*,[45] the defendants, on the other hand, were found to have infringed the copyright when they retained videotapes of television broadcasts for up to 10 years and showed them repeatedly. While 45 days seems an arbitrarily short length of time for fair use, 10 years with multiple plays fails to meet the fourth factor of the four-factor test – effect on the market for the work. If, however, a recording causes no economic harm and its purpose is educational in nature, it would probably be within fair use.

The following rules of thumb are based both on the *Off-Air Guidelines* and the *Sony* and *Encyclopedia Britannica* decisions:

1. Off-the-air recordings may be used only once by individual teachers in the course of "time-shifting" the program in order for it to be seen in the class. After the program is seen once, it should be erased.

2. The off-the-air recordings should be shown in classrooms and similar places devoted to instruction.

3. A limited number of copies may be reproduced from each off-air recording to meet the legitimate needs of teachers under these guidelines. Each such additional copy shall be subject to all provisions governing the original recording.

4. Off-the-air recordings need not be used in their entirety, but they may not be altered from their original content. They may not be physically or electronically combined or merged to constitute teaching anthologies or compilations.

Multimedia Works

Multimedia works consist of more than one of the categories of works protected by the Copyright Act. Such works, for example, could combine a sound recording with pictorial or graphic images. For "educational multi-

43. 464 U.S. 417 (1984).

44. *Id.* at 450, n. 33.

45. *Encyclopedia Britannica Educational Corp. v. Crooks*, 542 F. Supp. 1156 (W.D. N.Y. 1982).

media projects," which "incorporate students' or educators' original material" together with "various copyrighted media" as part of "a systematic learning activity by nonprofit educational institutions," the *Multimedia Guidelines* provide minimum standards for fair use.[46] These *Guidelines* not only place time, portion, copying, and distribution limitations on multimedia projects,[47] but they also place limitations on the use of such projects.[48]

With respect to uses that go beyond the rather restrictive requirements of the *Multimedia Guidelines* and that may require the permission of copyright owners, multimedia works do not present differences in kind compared to other uses of copyrighted materials. However, they do present differences in complexity and dimension. The nature of multimedia works is such that they draw on sources from a variety of different fields, each of which has its own history and practices for granting licenses. As an example, the music industry has developed a finely-textured assortment of rights for particular uses of musical compositions, including "mechanical licenses" for sound recordings, "synchronization licenses" for music synchronized with images, and "performance licenses" for public performance of musical compositions. Any one or more of these could be required for a multimedia work. In most cases, however, there is no one agency or person who can grant all the rights needed. Care, therefore, must be exercised in considering all of these issues whenever a university employee, student, or department uses a multimedia work.

Creation of Ad Hoc Anthology

Often when a textbook does not exist on a specific subject, a professor will create his or her own *ad hoc* "anthology" by copying articles and creating a collection. This is one of the most common forms of copyright infringement in the university setting, and publishers have repeatedly sued to prevent such copying.

In *Basic Books, Inc. v. Kinko's Graphics Corp.*,[49] the first such case to go to trial, a court held a copy center to have violated both the four-factor test of fair use and the *Agreement on Guidelines* by copying excerpts from numerous books and collecting them in a packet, which was then sold to students. In the *Kinko's* case, the court found only the second factor of the four-factor test, the nature of the copyrighted works, to favor the defendant. That factor, however, was outweighed by the other three factors, all of which the court held to favor a finding of unlawful copying. Although an educational institution that makes *ad hoc* anthologies using its own facilities would not be operating a nationwide, for-profit photocopying organization, as was the copy center in *Kinko's*, the case indicates that even university

46. *Multimedia Guidelines*, § 1.2.

47. For example, "fair use" pursuant to the *Multimedia Guidelines* is limited to use for a period of two years and use of 10% or less of a copyrighted work. *Multimedia Guidelines*, §§ 4.1 and 4.2.

48. For example, students may only use a multimedia project in the course for which it was created and as part of their portfolios for job or graduate school interviews. And educators may only use such projects for face-to-face instruction, as part of a self-study assignment for students, for remote instruction (pursuant to additional limitations), for peer conferences, and for their professional portfolios. *Multimedia Guidelines*, § 3.

49. 758 F. Supp. 1522 (S.D. N.Y. 1991).

photocopying of anthologies would probably be held to be beyond the bounds of fair use in most cases.

Recently, in *Princeton University Press v. Michigan Document Services, Inc.*,[50] the use of class packets was further restricted. The court held that a local print shop's compilation of class packets, without obtaining the publishers' permission, was not fair use. The court focused on the fourth factor, holding that it weighed in favor of the publishers since the challenged use was the copy shop's duplication, not the educational use by the students in the class. This commercial use, the court concluded, directly harmed the publishers' market for licensing revenues from photocopying – revenues that the publishers were receiving from other copy shops.

The print shop also failed to meet its burden of proof on the other three factors. With respect to the first factor, the court stated that, while the use at issue was clearly commercial, even the same copying by a professor or student might violate copyright law. With respect to the second and third factors respectively, the court held that the copied materials were "creative" and that the amounts copied far exceeded the 1000-word safe harbor set forth in the *Agreement on Guidelines*.

The *Kinko's* and *Princeton University Press* decisions are likely to make photocopy centers and university reserve rooms monitor more carefully the materials they are asked to reproduce. Therefore, a professor who is planning to hand out a significant quantity of copyrighted material in a particular course, which taken as a whole, might constitute an anthology, should obtain permission for the use of *each* copyrighted work, including those which, standing alone, could otherwise be copied under the *Agreement on Guidelines*.

Use of Factual Information

As noted above, facts themselves may not be copyrighted; however, a collection of facts may be copyrightable as a compilation if the creator of the collection demonstrates some originality in choosing, grouping or organizing the facts. The Copyright Act defines a compilation as "a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[51]

The leading case on the copyrightability of compilations of factual data is *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*,[52] a 1991 decision of the Supreme Court concerning copyright in a telephone directory. In that case the defendant, publisher of a regional telephone directory, who admitted using over 1,000 entries from the plaintiff telephone company's directory, was held not to have infringed plaintiff's copyright because the entries were facts not organized or selected in any original way. The case indicates that the only elements of a factual compilation for which an author may claim protection under copyright law are those elements that

50. 99 F.3d 1381 (6th Cir. 1996).
51. 17 U.S.C. § 101.
52. 499 U.S. 340 (1991).

the author in fact created – such as the organization or selection of the facts – not the facts themselves. An alphabetical listing of all telephone subscribers in a community lacks sufficient originality to be protectable. The court explicitly rejected the theory, adopted by some lower courts, that the effort expended by the creator of a factual compilation is protected under copyright law even in the absence of originality.[53]

Professors, researchers and students, therefore, may use facts contained in a copyrighted work without infringing the copyright as long as they do not appropriate elements of the work that are original, such as a particular selection, coordination or arrangement of the facts.

Computers on Campus

Use of Computer Software

Statutory Protections. Computer software is used in myriad situations at colleges and universities. The various uses present the potential for both direct and vicarious liability for universities because computer software is protected by copyright law. All of the rights of copyright owners listed in Section 106 are accorded to owners of copyright in software. Moreover, computer software is very easy to copy and distribute. Downloading it to a hard drive or a floppy diskette, or e-mailing it to someone else are two common means of potentially infringing copyrights.[54]

Section 117 of the Copyright Act contains special provisions governing the copying and adaptation of software. Specifically, it allows copying and adaptation of software as an essential step in using the program "in conjunction with a machine" or for archival purposes.[55] The limitations on copying "for archival purposes" require that the copy be destroyed when the possession of the original ceases. Note also that the right to copy and adapt provided by Section 117 applies only to the software and not to software documentation.

The Impact of License Agreements. Most computer software is licensed rather than sold outright. The purchaser of licensed software acquires only the right to use the software within the limits of the license agreement accompanying the software. In such cases, the purchaser does not purchase a copy of the software and, therefore, may not acquire the rights that a purchaser of a copy of copyrighted material normally acquires, including the right to resell the software under the "first sale doctrine" of Section 109 of the Copyright Act. Moreover, the license agreement may impose con-

53. Use of factual information may be limited under certain circumstances by other applicable law, such as patent law or state unfair competition law. Also, more extensive protection for databases is provided in the European Union. *See Directive 96/9, OJ 1996 L77/20* (creating an exclusive economic right in databases for database creators irrespective of whether the database is innovative, valid for fifteen years).

54. Indeed, some courts have held that even the transferring of a program onto a computer's random access memory (RAM) constitutes copying that could be infringing. *See, e.g., Advanced Computer Services v. MAI Systems*, 845 F. Supp. 356 (E.D. Va. 1994); *Triad Systems Corp. v. Southeastern Express Co.*, 64 F.3d 1330 (9th Cir. 1995), *cert. denied*, 116 S.Ct.1015 (1996).

55. In *Aymes v. Bonelli*, 47 F.3d 23, 26 (2d Cir. 1995), for example, the court stated that the defendant's modifications of the software for "internal use" were permitted, "as long as the adapted program is not distributed in an unauthorized manner."

straints and obligations on the licensee, such as a prohibition against reverse engineering, that are not found in the Copyright Act. Some sellers of computer software, however, may provide broader rights in their licenses to colleges and universities than they do to for-profit commercial institutions.

Much "off the shelf" computer software is accompanied by "shrink-wrap" licenses, which stipulate that the customer agrees to the terms of the license by tearing the plastic wrapping of the software package. The United States Court of Appeals for the Seventh Circuit has held such licenses to be binding, although earlier lower court decisions in other circuits had not.[56] Nonetheless, some provisions in otherwise valid licenses may be unenforceable.[57] Colleges and universities that purchase software accompanied by shrink-wrap licenses will, of course, be subject to the terms of such licenses unless they can negotiate otherwise. The limits generally imposed by such licenses often include the following:

- Restriction of use to a single CPU;
- Restriction on making additional copies of the software or accompanying documentation;
- Restriction on modifying or altering the software, including incorporating it into any other software;
- Restriction on disassembly or reverse engineering.

Networked Computing on Campus

Potential Liability for Networking. University campuses often provide a networked computing environment for employees and students. "Networking" refers to any of a variety of methods by which computers may be interconnected. Such "local access" networks could be provided on hardware available to students and employees (in computer work rooms or labs, for example) or simply by means of a connection in the students' dormitory rooms for plugging their own computers into the network. Both the creation of such an environment by the university and its use by employees and students can, however, create risks of copyright liability for some or all of the persons involved. Liability, for example, can result from the failure of the university or its employees or students to comply with the terms of a license agreement; the "posting" of a program or other copyrighted material on a network or Internet bulletin board; the transmission of copyrighted material to others on the network by means of an e-mail attachment; or the down-

56. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) ("Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general"). Earlier decisions that have held shrink-wrap license to be unenforceable include *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991) and *Vault Corp. v. Quaid Software Ltd.*, 655 F. Supp. 750 (E.D. La. 1987), *aff'd*, 847 F.2d 255 (5th Cir. 1988).

57. One court has held that even if an otherwise valid licensing agreement restricts enhancements to a program could be made without infringing copyright. The judge wrote: "the court does not believe that plaintiff's right to improve or enhance its products is exclusive." *Foresight Resources Corp. v. Pfortmiller*, 719 F. Supp. 1006, 1010 (D. Kan. 1989). He reasoned that

> [o]n the one hand, allowing sophisticated software users to enhance copies of copyrighted programs they have purchased eliminates the need to choose between either buying the latest version of a program or possibly infringing the program's owner's copyright. At the same time, allowing such enhancements to be used only in-house preserves the market for improvements made by the copyright holder.

Id. at 1010. Such reasoning seems particularly applicable in an educational context.

loading of copyrighted material off the network onto a hard drive for personal use. These scenarios and others like them involve possible infringement of the copyright in the software or other copyrighted materials that are copied or distributed electronically.

Universities Should Seek Permission in License Agreements to Network or Copy Software. The extent to which networking and copying of particular software are allowed depends in large part on the applicable license agreements, some of which allow no networking or copying beyond the scope of Section 117, and others of which allow extensive networking and copying.

For example, many sellers of Internet browser software grant broad rights in their standard shrink-wrap licenses to copy and distribute the software.[58] In addition, sellers of networking products understandably often allow copying of client software that is compatible with their server software.[59]

To the extent that a standard shrink-wrap license for particular software does not allow networking of the software, the university may be able to negotiate a license to serve that institution. For example, some universities have negotiated special licenses for software that provides e-mail capabilities. Universities also can negotiate special licenses for software that is customized and used in a particular lab, or that is for use on a mainframe. In addition to granting greater rights to copy, such licenses may allow for more extensive modifications of software than Section 117 allows.

Networking and the Internet. Universities that provide students, faculty, and staff with access to the Internet by means of campus-wide computer networks face additional sources of possible copyright liability. Universities could be vicariously liable for users' downloading of copyrighted materials from the Internet, particularly if they are on notice that such activities are taking place using their facilities and they take no action to stop them. The principles for infringement and fair use with respect to this type of activity are the same as for traditional means of copying. For example, on-line copying from databases and compilations of information that are not "original" or "creative" enough to warrant copyright protection will likely not be considered infringing, while on-line copying from copyright-protected databases could constitute infringement.[60]

In addition, universities can incur vicarious or contributory liability for users' uploading (*i.e.*, placing or posting) of materials, such as games, pictures, or articles on network facilities provided by the universities[61] or for

58. Gomulkiewicz and Williamson, "A Brief Defense of Mass Market Software License Agreements," 22 *Rutgers Computer & Technology Law Journal* 335, 354 (1996).

59. *Id.* at 355.

60. Kurz and Jimenez, "Copyrights On-Line," 39 *Howard Law Journal* 531, 542 (1996).

61. Such liability would likely be based upon the same considerations of copyrightability and fair use. For example, in *Religious Technology Center v. Lerma*, No. 95-1107-A, 1996 U.S. Dist. LEXIS 15454 (E.D. Va. October 4, 1996), the Court held that a user's posting of the Church of Scientology's unpublished materials on the Internet was not fair use. Contrast *Religious Technology Center v. F.A.C.T.Net, Inc.*, 901 F. Supp. 1519 (D. Colo. 1995), where the Court held that the posting of the Church of Scientology's materials on an Internet news group's bulletin board was fair use, because they were made for the purpose of discussion and criticism. See also *Sega Enterprises Ltd. v. Maphia*, 857 F. Supp. 679 (N.D. Cal. 1994) (holding computer bulletin board company liable for allowing and financially benefitting from the copying of copyrighted games);

their transmission of copyrighted material via the universities' e-mail system. Such activities can seem deceptively harmless to students who regularly participate in discussion or news groups on the Internet. Nonetheless, where these activities include transmitting the protected works of others, infringement can occur. Such activities probably constitute unauthorized copying, as well as infringement, of the copyright owner's right to distribute copies and to make derivative works.[62]

Actions an Educational Institution Can Take to Limit Vicarious Liability For Software Copying From the Network Or Otherwise

There is no statutory safe harbor for copying by computers that is analogous to the Section 108 safe harbor for library photocopying. Therefore, universities must devise their own policies to reduce the risk of liability as a contributory infringer. In particular, they should probably (1) have clearly-defined internal policies; (2) have carefully negotiated agreements with software vendors, where possible; and (3) have computing practices that discourage illicit copying and emphasize compliance with licenses. Universities should endeavor to ensure that those who use their computer facilities are familiar with their policies, and they should institute and enforce penalties against students who disobey them. When software is loaned, it should be labeled as copyrighted material.

Courts have not yet decided the question whether and to what extent an entity such as a university that provides a network facility is liable for acts of persons using the network. Until the law is settled, a reasonable rule of thumb is that universities should take steps to stop infringing uses of their facilities whenever they are on notice of such uses. To minimize potential liability, universities should consider posting a notice, in employee or student manuals, near network computers, and directly on the network itself, similar to the Section 108(f)(1) notice required for protection of libraries, so that users will see the notice *before* accessing the service. In considering such limitations, universities must balance their need to protect themselves from potential liability against the rights of expression and academic freedom of their users. Public universities would also be required to balance the desire to avoid copyright infringement liability against First Amendment limits on their ability to limit users' access to and transmission of information.[63] Private institutions, which are not subject to First Amendment restrictions, would have broader freedom to impose such restrictions.

Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993) (holding computer bulletin board operator liable for copying pictures) compared with *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (holding that computer bulletin board service was not directly or vicariously liable, but denying summary judgment on the issue of fair use).

62. In addition, under the recent "moral rights" amendments to the Copyright Act, an infringement can occur where a user posts a copyrighted work of visual art on the Internet in a distorted or modified form that is found to be prejudicial to the author's honor or reputation. 17 U.S.C. §106A.

63. In *Loving v. Boren*, 956 F. Supp. 953 (W.D. Okla. 1997), the Court held that the University of Oklahoma did not violate the First Amendment by removing sex-related databases from its campus network's access, stating "[t]he limitation of [university] Internet services to research and academic purposes is not a violation of the First Amendment in that those purposes are the very ones for which the system was purchased."

MISCELLANEOUS

How To Obtain Copyright Permission for Published Works

If the proposed reproduction of a copyrighted work does not fall under fair use or any of the other exceptions described here, then one must obtain permission to make a copy.

The same day the 1976 Act went into effect, the Copyright Clearance Center (CCC) was created by a group of publishers. The purpose of the CCC is to provide permissions, on behalf of copyrighted holders, for copying of printed materials. The CCC created a "Transactional Reporting System" that requires member publishers to print a publisher's consent to make copies, and its fee, on the first page of any article or book chapter. The user is then responsible for making periodic payments to the CCC for all copies that exceed fair use. After deducting an administrative fee, the CCC distributes payments to the publishers whose works were copied.[64]

In addition to the CCC, other groups of copyright holders have established their own clearance organizations for granting permissions. For example, in the area of musical works, the well-known performing rights organizations Broadcast Music, Inc and the American Society of Composers, Authors, Publishers provide nonexclusive licenses for public performances of musical compositions. Similarly, the Harry Fox Agency, Inc. is a source of "mechanical licenses."

However, there is no requirement that copyright holders be organized into clearance societies to provide permissions or that they even grant permissions. Indeed, the majority of copyrighted works are not represented by such societies. In these situations, the person seeking to copy works will be forced to seek permission directly from the copyright holders in a piecemeal fashion. Where copyright holders are not represented by any group, the person seeking permission may wish to work with a consultant who specializes in this area. Such consultants might be lawyers or accountants, or they may be organized into specialty consulting firms. Two of the many firms that seek copyright permissions on behalf of consumers are The Copyright Group (which seeks permissions for copying or on-line and multimedia materials) and Search Works (which seeks permissions for copying film clips). In addition to providing an efficient means of obtaining permissions for works that are not represented by copyright societies, consultants such as these are particularly useful for a university department that or an employee who is compiling works for broader or more systematic uses than single-use projects. Such broader uses could include the compiling of course-packs which will be used repeatedly or the making of a CD-ROM.

Those who wish to avoid the use of consultants can write a letter to the publisher requesting permission to copy. Such a letter should include information such as: title, author and/or editor, and edition of materials to be

64. The CCC also has a second program, the Annual Authorizations Service, which audits the user's photocopy activity, and approximates the number of times the user copies works from particular publishers. The user pays an annual license fee based on these audits.

duplicated; exact material to be used, giving amount, page numbers, chapters and, if possible, a photocopy of the material; number of copies to be made; use to be made of duplicated materials; form of distribution (classroom, newsletter, etc.); whether or not the material is to be sold; and type of reprint (ditto, photography, offset, typeset).

Penalties for Infringement

Section 504 of the Copyright Act describes the penalties for infringing a copyright. The law states that the "copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages."[65] Instead of actual damages and lost profits, a plaintiff may elect to claim statutory damages for an infringement, which may be set at $500 to $20,000 "as the court considers just."[66]

Statutory damages may be increased up to $100,000 if the infringement is found to be willful.[67] However, if a court finds that the copyright infringement was innocent, then the court may reduce the award of statutory damages "to a sum of not less than $200." However,

> [t]he court shall remit statutory damages in any case where the infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under Section 107, if the infringer was an employee or agent of a nonprofit educational institution, library, or archives ... which infringed by reproducing the work in copies or phonorecords.[68]

"It is intended that, in cases involving this provision, the burden of proof with respect to the defendant's good faith should rest on the plaintiff."[69] Therefore, in many cases, the plaintiff would have difficulty obtaining statutory damages against universities.

If a college or university reasonably uses the guidelines or the four-factor test to approve copying which a court subsequently determines is not fair use, it should not be liable for statutory damages. As long as an institution believes and has reasonable grounds for believing that copying is fair, its penalty for infringement should not exceed the legitimate price of permission to copy.

In addition to these monetary damages, a copyright plaintiff can, and frequently does, seek injunctive relief. Finally, criminal penalties can be imposed upon a "person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain."[70]

65. 17 U.S.C. § 504(b).

66. 17 U.S.C. § 504(c).

67. 17 U.S.C. § 504(c) (2). A recent case has held that "[o]ne who has been notified that his conduct constitutes infringement, but who reasonably believes the contrary, is not 'willful' for these purposes." *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996).

68. 17 U.S.C. § 504(c).

69. H.R. Rep. No. 1476, 94th Cong. 2d Sess. 45, 163 (1976).

70. 17 U.S.C. § 506(a).

CONCLUSION

The following questions should be asked to determine if a particular use of a work constitutes fair use:

1. *Is the use for the purpose of non-commercial education, science or research?*

   If this first factor is established, the burden shifts to the plaintiff to prove that the use was not fair.

2. *Is the copyrighted work published, unpublished, fact or fiction?*

   Greater deference is given to published and to nonfiction works.

3. *Is the amount copied a substantial part of the original work?*

   A single sentence of one work may be deemed substantial, while a much greater portion of another work may not be deemed substantial at all. The test hinges on whether the part copied was "of critical importance to the work as a whole and taken by the infringer in order to save the time and expense incurred by the copyright owner."

   This factor is dependant upon factor 2. Taking larger sections of non-fiction, published works is more tolerated.

4. *Does the copying impair materially the market for, or value of, the copied work?*

   If it does, the copying is probably not fair use. These four factors must be balanced, with the most important issue being whether the copying impaired materially the market for or value of the copied work. Without a showing of actual damages, courts have been hard pressed to find infringement.

Because general counsel cannot oversee all reproduction that occurs in a university's facilities, many institutions require their constituencies to follow the bright-line rules set forth in the various guidelines for educational copying. The Copyright Act provides a more flexible test for fair use under which more uses of a work are permitted than under the various guidelines. The four-factor test, however, involves greater risk, because its flexibility leads to uncertainty about the precise extent of permissible copying in specific situations. Therefore, when members of the academic community wish to make copies that exceed what is permitted by the guidelines, it is undoubtedly a good policy to consult with legal counsel.

Appendix A

AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS

With Respect to Books and Periodicals
March 19, 1976

The purpose of the following guidelines is to state the minimum standards of educational fair use under Section 107 of H.R. 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of the guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill [subsequently enacted as 17 U.S.C. § 107]. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

GUIDELINES

I. SINGLE COPYING FOR TEACHERS

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

A. A chapter from a book;

B. An article from a periodical or newspaper;

C. A short story, short essay or short poem, whether or not from a collective work;

D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.

II. MULTIPLE COPIES FOR CLASSROOM USE

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion, provided that:

A. The copying meets the tests of brevity and spontaneity as defined below; and

B. Meets the cumulative effect test as defined below; and

C. Each copy includes a notice of copyright.

DEFINITIONS

Brevity

(i) Poetry: (a) a complete poem if less than 250 words and if printed on not more than two pages, or (b) from a longer poem, an excerpt of not more than 250 words.

(ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10 percent of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in (i) and (ii) above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph].

(iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(iv) "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety; Paragraph (ii) above notwithstanding, such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10 percent of the words found in the text thereof, may be reproduced.

Spontaneity

(i) The copying is at the instance and inspiration of the individual teacher; and

(ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

(i) The copying of the material is for only one course in the school in which the copies are made.

(ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(iii) There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in (ii) and (iii) above shall not apply to current news periodicals and newspapers and current news sections of other periodicals].

III. **PROHIBITIONS AS TO I AND II ABOVE**

Notwithstanding any of the above, the following shall be prohibited:

A. Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works of excerpts therefrom are accumulated or reproduced and used separately.

B. There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

C. Copying shall not:
   (a) substitute for the purchase of books, publishers' reprints or periodicals;
   (b) be directed by higher authority;
   (c) be repeated with respect to the same item by the same teacher from term to term.

D. No charge shall be made to the student beyond the actual cost of the photocopying.

Appendix B

GUIDELINES FOR EDUCATIONAL USES OF MUSIC

April 30, 1976
[Preamble is the same as *Agreement on Guidelines*]

A. Permissible Uses

1. Emergency copying to replace purchased copies which for any reason are not available for an imminent performance, provided purchased replacement copies shall be substituted in due course.
2. For academic purposes other than performance, single or multiple copies of excerpts of works may be made, provided that the excerpts do not comprise a part of the whole which would constitute a performable unit such as a section, movement or aria, but in no case more than 10 percent of the whole work. The number of copies shall not exceed one copy per pupil.
3. Printed copies which have been purchased may be edited or simplified provided that the fundamental character of the work is not distorted or the lyrics, if any, altered or lyrics added if none exist.
4. A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher.
5. A single copy of a sound recording (such as a tape, disc or cassette) of copyrighted music may be made from sound recordings owned by an educational institution or an individual teacher for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual teacher. (This pertains only to the copyright of the music itself and not to any copyright which may exist in the sound recording.)

B. Prohibitions

1. Copying to create or replace or substitute for anthologies, compilations or collective works.
2. Copying of or from works intended to be "consumable" in the course of study or of teaching such as workbooks, exercises, standardized tests and answer sheets and like material.
3. Copying for the purpose of performance, except as in A(1) above.
4. Copying for the purpose of substituting for the purchase of music, except as in A(1) and A(2) above.
5. Copying without inclusion of the copyright notice which appears on the printed copy.

Appendix C

GUIDELINES FOR OFF-AIR RECORDING OF BROADCAST PROGRAMMING FOR EDUCATIONAL PURPOSES (1979)

(1) The guidelines were developed to apply only to off-air recording by non-profit educational institutions.

(2) A broadcast program may be recorded off-air simultaneously with broadcast transmission (including simultaneous cable transmission) and retained by a non-profit educational institution for a period not to exceed the first forty-five (45) consecutive calendar days after a date of recording. Upon conclusion of such retention period, all off-air recordings must be erased or destroyed immediately. "Broadcast programs" are television programs transmitted by television stations for reception by the general public without charge.

(3) Off-air recordings may be used once by individual teachers in the course of relevant teaching activities, and repeated once only when instructional reinforcement is necessary, in classrooms and similar places devoted to instruction within a single building, cluster, or campus, as well as in the homes of students receiving formalized home instruction, during the first ten (10) consecutive school days in the forty-five (45) day calendar day retention period. "School days" are school session days – not counting weekends, holidays, vacations, examination periods, or other scheduled interruptions – within the forty-five (45) calendar day retention period.

(4) Off-air recordings may be made only at the request of, and used by, individual teachers, and may not be regularly recorded in anticipation of requests. No broadcast program may be recorded off-air more than once at the request of the same teacher, regardless of the number of times the program may be broadcast.

(5) A limited number of copies may be reproduced from each off-air recording to meet the legitimate needs of teachers under these guidelines. Each such additional copy shall be subject to all provisions governing the original recording.

(6) After the first ten (10) consecutive school days, off-air recording may be used up to the end of the forty-five (45) calendar day retention period only for teacher evaluation purposes, i.e., to determine whether or not to include the broadcast program in the teaching curriculum, and may not be used in the recording institution for student exhibition or any other non-evaluation purpose without authorization.

(7) Off-air recordings need not be used in their entirety, but the recorded programs may not be altered from their original content. Off-air recordings may not be physically or electronically combined or merged to constitute teaching anthologies or compilations.

(8) All copies of off-air recordings must include the copyright notice on the broadcast program as recorded.

(9) Educational institutions are expected to establish appropriate control procedures to maintain the integrity of these guidelines.

[The *Off-Air Guidelines* predate *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984), and are, in some respects, much more restrictive than that case.]

Appendix D

PROPOSAL FOR FAIR USE GUIDELINES FOR EDUCATIONAL MULTIMEDIA[1]

1. INTRODUCTION

1.1 Preamble

Fair use is a legal principle that provides certain limitations on the exclusive rights[2] of copyright holders. The purpose of these guidelines is to provide guidance on the application of fair use principles by educators, scholars and students who develop multimedia projects using portions of copyrighted works under fair use rather than by seeking authorization for non-commercial educational uses. These guidelines apply only to fair use in the context of copyright and to no other rights.

There is no simple test to determine what is fair use. Section 107 of the Copyright Act[3] sets forth the four fair use factors which should be considered in each instance, based on particular facts of a given case, to determine whether a use is a "fair use": (1) the purpose and character of use, including whether such use is of a commercial nature or is for nonprofit educational purposes, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work.

While only the courts can authoritatively determine whether a particular use is fair use, these guidelines represent the endorsers' consensus of conditions under which fair use should generally apply and examples of when permission is required. Uses that exceed these guidelines may or may not be fair use. The endorsers also agree that the more one exceeds these guidelines, the greater the risk that fair use does not apply.

The limitations and conditions set forth in these guidelines do not apply to works in the public domain – such as U.S. Government works or works on which copyright has expired for which there are no copyright restrictions – or to works for which the individual or institution has obtained permission for the particular use. Also, license agreements may govern the uses of some works and users should refer to the applicable license terms for guidance.

The participants who developed these guidelines met for an extended period of time and the result represents their collective understanding in this complex area. Because digital technology is in a dynamic phase, there may come a time when it is necessary to review the guidelines. Nothing in these guidelines shall be construed to apply to the fair use privilege in any context outside of educational and scholarly uses of educational multimedia projects.[4] These guidelines do not cover noneducational or commercial digitization or use at any time, even by non-profit educational institutions. These guidelines are not intended to cover fair use of copyrighted works in other educational contexts such as educational multimedia projects, distance education, or electronic reserves, which may be addressed in other fair use guidelines.

1. These guidelines shall not be read to supersede other preexisting educational use guidelines that deal with the 1976 Copyright Act.

2. See Section 106 of the Copyright Act.

3. The Copyright Act of 1976, as amended, is codified at 17 U.S.C. a 101 et. seq.

4. In general, multimedia projects are stand-alone, interactive programs incorporating both original and pre-existing copyrighted works in various media formats, while visual image archives are databases of individual visual images from which images intended for educational uses may be selected for display.

This Preamble is an integral part of these guidelines and should be included whenever the guidelines are reprinted or adopted by organizations and educational institutions. Users are encouraged to reproduce and distribute these guidelines freely without permission; no copyright protection of these guidelines is claimed by any person or entity.

1.2 Background

These guidelines clarify the application of fair use of copyrighted works as teaching methods are adapted to new learning environments. Educators have traditionally brought copyrighted books, videos, slides, sound recordings and other media into the classroom, along with accompanying projection and playback equipment. Multimedia creators integrated these individual instructional resources with their own original works in a meaningful way, providing compact educational tools that allow great flexibility in teaching and learning. Material is stored so that it may be retrieved in a nonlinear fashion, depending on the needs or interests of learners. Educators can use multimedia projects to respond spontaneously to students' questions by referring quickly to relevant portions. In addition, students can use multimedia projects to pursue independent study according to their needs or at a pace appropriate to their capabilities. Educators and students want guidance about the application of fair use principles when creating their own multimedia projects to meet specific instructional objectives.

1.3 Applicability of These Guidelines

These guidelines apply to the use, without permission, of portions of lawfully acquired copyrighted works in educational multimedia projects which are created by educators or students as part of a systematic learning activity by nonprofit educational institutions. Educational multimedia projects created under these guidelines incorporate students' or educators' original material, such as course notes or commentary, together with various copyrighted media formats including but not limited to, motion media, music, text material, graphics, illustrations, photographs and digital software which are combined into an integrated presentation. Educational institutions are defined as nonprofit organizations whose primary focus is supporting research and instructional activities of educators and students for noncommercial purposes.

For the purposes of these guidelines, educators include faculty, teachers, instructors and others who engage in scholarly, research and instructional activities for educational institutions. The copyrighted works used under these guidelines are lawfully acquired if obtained by the institution or individual through lawful means such as purchase, gift or license agreement but not pirated copies. Educational multimedia projects which incorporate portions of copyrighted works under these guidelines may be used only for educational purposes in systematic learning activities including use in connection with non-commercial curriculum-based learning and teaching activities by educators to students enrolled in courses at nonprofit educational institutions or otherwise permitted under Section 3. While these guidelines refer to the creation and use of educational multimedia projects, readers are advised that in some instances other fair use guidelines such as those for off-air taping may be relevant.

2. PREPARATION OF EDUCATIONAL MULTIMEDIA PROJECTS USING PORTIONS OF COPYRIGHTED WORKS

These uses are subject to the Portion Limitations listed in Section 4. They should include proper attribution and citation as defined in Sections 6.2.

2.1 By Students:

Students may incorporate portions of lawfully acquired copyrighted works when producing their own educational multimedia projects for a specific course.

2.2 By Educators for Curriculum-Based Instruction:

Educators may incorporate portions of lawfully acquired copyrighted works when producing their own educational multimedia projects for their own teaching tools in support of curriculum-based instructional activities at educational institutions.

3. PERMITTED USES OF EDUCATIONAL MULTIMEDIA PROJECTS CREATED UNDER THESE GUIDELINES

Uses of educational multimedia projects created under these guidelines are subject to the Time, Portion, Copying and Distribution Limitations listed in Section 4.

3.1 Student Use:

Students may perform and display their own educational multimedia projects created under Section 2 of these guidelines for educational uses in the course for which they were created and may use them in their own portfolios as examples of their academic work for later personal uses such as job and graduate school interviews.

3.2 Educator Use for Curriculum-Based Instruction:

Educators may perform and display their own educational multimedia projects created under Section 2 for curriculum-based instruction to students in the following situations:

3.2.1 for face-to-face instruction,

3.2.2 assigned to students for directed self-study,

3.2.3 for remote instruction to students enrolled in curriculum-based courses and located at remote sites, provided over the educational institution's secure electronic network in real-time, or for after class review or directed self-study, provided there are technological limitations on access to the network and educational multimedia project (such as a password or PIN) and provided further that the technology prevents the making of copies of copyrighted material.

If the educational institution's network or technology used to access the educational multimedia project created under Section 2 of these guidelines cannot prevent duplication of copyrighted material, students or educators may use the multimedia educational projects over an otherwise secure network for a period of only 15 days after its initial real-time remote use in the course of instruction or 15 days after its assignment for directed self-study. After that period, one of the two use copies of the educational multimedia project may be placed on reserve in a learning resource center, library or similar facility for on-site use by students enrolled in the course. Students shall be advised that they are not permitted to make their own copies of the educational multimedia project.

3.3 Educator Use for Peer Conferences:

Educators may perform or display their own educational multimedia projects created under Section 2 of these guidelines in presentations to their peers, for example, at workshops and conferences.

3.4 Educator Use for Professional Portfolio

Educators may retain educational multimedia projects created under Section 2 of these guidelines in their personal portfolios for later personal uses such as tenure review or job interviews.

4. LIMITATIONS – TIME, PORTION, COPYING AND DISTRIBUTION

The preparation of educational multimedia projects incorporating copyrighted works under Section 2, and the use of such projects under Section 3, are subject to the limitations noted below.

4.1 Time Limitations

Educators may use their educational multimedia projects created for educational purposes under Section 2 of these guidelines for teaching courses, for a period of up to two years after the first instructional use with a class. Use beyond that time period, even for educational purposes, requires permission for each copyrighted portion incorporated in the production. Students may use their educational multimedia projects as noted in Section 3.1.

4.2 Portion Limitations

Portion limitations mean the amount of a copyrighted work that can reasonably be used in educational multimedia projects under these guidelines regardless of the original medium from which the copyrighted works are taken. In the aggregate means the total amount of copyrighted material from a single copyrighted work that is permitted to be used in an educational multimedia project without permission under these guidelines. These limitations apply cumulatively to each educator's or student's multimedia project(s) for the same academic semester, cycle or term. All students should be instructed about the reasons for copyright protection and the need to follow these guidelines. It is understood, however, that students in kindergarten through grade six may not be able to adhere rigidly to the portion limitations in this section in their independent development of educational multimedia projects. In any event, each such project retained under Sections 3.1 and 4.3 should comply with the portion limitations in this section.

4.2.1 Motion Media

Up to 10% or 3 minutes, whichever is less, in the aggregate of a copyrighted motion media work may be reproduced or otherwise incorporated as part of an educational multimedia project created under Section 2 of these guidelines.

4.2.2 Text Material

Up to 10% or 1000 words, whichever is less, in the aggregate of a copyrighted work consisting of text material may be reproduced or otherwise incorporated as part of an educational multimedia project created under Section 2 of these guidelines. An entire poem of less than 250 words may be used, but no more than three poems by one poet, or five poems by different poets from any anthology may be used. For poems of greater length, 250 words may be used but no more than three excerpts by a poet, or five excerpts by different poets from a single anthology may be used.

4.2.3 Music, Lyrics, and Music Video

Up to 10%, but in no event more than 30 seconds, of the music and lyrics from an individual musical work (or in the aggregate of extracts from an individual work), whether the musical work is embodied in copies, or audio or audiovisual works, may be reproduced or otherwise incorporated as a part of a multimedia project created under Section 2. Any alterations to a musical work shall not change the basic melody or the fundamental character of the work.

4.2.4 Illustrations and Photographs

The reproduction or incorporation of photographs and illustrations is more difficult to define with regard to fair use because fair use usually precludes the use of an entire work. Under these guidelines a photograph or illustration may be used in its entirety but no more than 5 images by an artist or photographer may be reproduced or otherwise incorporated as part of an educational multimedia project created under Section 2. When using photographs and illustrations from a published collective work, not more than 10% or 15 images, whichever is less, may be reproduced or otherwise incorporated as part of an educational multimedia project created under Section 2.

4.2.5 Numerical Data Sets

Up to 10% or 2500 fields or cell entries, whichever is less, from a copyrighted database or data table may be reproduced or otherwise incorporated as part of an educational multimedia project created under Section 2 of these guidelines. A field entry is defined as a specific item of information, such as a name or Social Security number, in a record of a database file. A cell entry is defined as the intersection where a row and a column meet on a spreadsheet.

4.3 Copying and Distribution Limitations

Only a limited number of copies, including the original, may be made of an educator's educational multimedia project. For all of the uses permitted by Section 3, there may be no more than two use copies only one of which may be placed on reserve as described in Section 3.2.3. An additional copy may be made for preservation purposes but may only be used or copied to replace a use copy that has been lost, stolen, or damaged. In the case of a jointly created educational multimedia project, each principal creator may retain one copy but only for the purposes described in Sections 3.3 and 3.4 for educators and in Section 3.1 for students.

5. EXAMPLES OF WHEN PERMISSION IS REQUIRED

5.1 Using Multimedia Projects for Non-Educational or Commercial Purposes

Educators and students must seek individual permissions (licenses) before using copyrighted works in educational multimedia projects for commercial reproduction and distribution.

5.2 Duplication of Multimedia Projects Beyond Limitations Listed in These Guidelines

Even for educational uses, educators and students must seek individual permissions for all copyrighted works incorporated in their personally created educational multimedia projects before replicating or distributing beyond the limitations listed in Section 4.3.

5.3 Distribution of Multimedia Projects Beyond Limitations Listed in These Guidelines

Educators and students may not use their personally created educational multimedia projects over electronic networks, except for uses as described in Section 3.2.3, without obtaining permissions for all copyrighted works incorporated in the program.

6. IMPORTANT REMINDERS

6.1 Caution in Downloading Material from the Internet

Educators and students are advised to exercise caution in using digital material downloaded from the Internet in producing their own educational multimedia projects, because there is a mix of works protected by copyright and works in the public domain on the network. Access to works on the Internet does not automatically mean that these can be reproduced and reused without permission or royalty payment and, furthermore, some copyrighted works may have been posted to the Internet without authorization of the copyright holder.

6.2 Attribution and Acknowledgment

Educators and students are reminded to credit the sources and display the copyright notice and copyright ownership information if this is shown in the original source, for all works incorporated as part of educational multimedia projects prepared by educators and students, including those prepared under fair use. Crediting the source must adequately identify the source of the work, giving a full bibliographic description where available (including author, title, publisher, and place and date of publication). The copyright ownership information includes the copyright notice (©, year of first publication and name of the copyright holder).

The credit and copyright notice information may be combined and shown in a separate section of the educational multimedia project (e.g., credit section) except for images incorporated into the project for the uses described in Section 3.2.3. In such cases, the copyright notice and the name of the creator of the image must be incorporated into the image when, and to the extent, such information is reasonably available; credit and copyright notice information is considered incorporated" if it is attached to the image file and appears on the screen when the image is viewed. In those cases when displaying source credits and copyright ownership information on the screen with the image would be mutually exclusive with an instructional objective (e.g. during examinations in which the source credits and/or copyright information would be relevant to the examination questions), those images may be displayed without such information being simultaneously displayed on the screen. In such cases, this information should be linked to the image in a manner compatible with such instructional objectives.

6.3 Notice of Use Restrictions

Educators and students are advised that they must include on the opening screen of their multimedia project and any accompanying print material a notice that certain materials are included under the fair use exemption of the U.S. Copyright Law and have been prepared according to the educational multimedia fair use guidelines and are restricted from further use.

6.4 Future Uses Beyond Fair Use

Educators and students are advised to note that if there is a possibility that their own educational multimedia project incorporating copyrighted works under fair use could later result in broader dissemination, whether or not as commercial prod-

uct, it is strongly recommended that they take steps to obtain permissions during the development process for all copyrighted portions rather than waiting until after completion of the project.

6.5 Integrity of Copyrighted Works: Alterations

Educators and students may make alterations in the portions of the copyrighted works they incorporate as part of an educational multimedia project only if the alterations support specific instructional objectives. Educators and students are advised to note that alterations have been made.

6.6 Reproduction or Decompilation of Copyrighted Computer Programs

Educators and students should be aware that reproduction or decompilation of copyrighted computer programs and portions thereof, for example the transfer of underlying code or control mechanisms, even for educational uses, are outside the scope of these guidelines.

6.7 Licenses and Contracts

Educators and students should determine whether specific copyrighted works, or other data or information are subject to a license or contract. Fair use and these guidelines shall not preempt or supersede licenses and contractual obligations.

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